Supreme Court, U.S.
FILED
MAR 2 1989
JOSEPH F. SPANIOL, JR.
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No. 88-982

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

WALL STREET PUBLISHING INSTITUTE, INC.

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER

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Pursuant to this Court's 22.5, Petitioner Wall Street Publishing Institute, Inc., ("WSPI") replies to the Brief filed in Opposition to its Petition as follows:

I:

The Respondent SEC's 1/ Opposition contends at its outset that:

> "At this juncture, the terms of any injunction that may be imposed on petitioner have not been established, and review by this Court of the constitutionality of any such order would be speculative and hypothetical." 2/

The "terms" of the injunction authorized by the Court of Appeals are not the issue before this Court. The issue before this Court is the injunction authorized by the Court of Appeals ordering the publisher of a magazine to include within the content of articles in

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1/ Brief for Respondent in Opposition (hereinafter "Respondent's Opposition" or "Res. Opp.") 8-9;
2/ Ibid, 9;

his magazine court-dictated language.3/ The Respondent SEC freely admits this:

> "The Court of Appeals correctly held that the First Amendment would permit an injunction requiring Petitioner to comply with Section 17 (b)..." 4/

That injunction would require the publisher of Stock Market Magazine to print a court-dictated legend within its articles. 4A/ To the knowledge of undersigned counsel this Court has never permitted a federal court to dictate the content of an article within a magazine or newspaper; indeed, it has specifically refused to do so. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256. Certainly Section 17(b) has never been enforced to this date by injunction as Respondent now seeks.

There is nothing speculative or hypothetical about the remedy sought by the

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3/ "requiring disclosure of payments for advertising and reprints that were in fact a quid pro quo for publication of the featured articles" (Res. Opp. 7);
4/ Res. Opp. 9;
4A/ See footnote 3, supra;

Respondent. It is an injunction, enforced by contempt proceedings against the publisher of an offending magazine and by suppression (from interstate commerce and the mails) of his publication. The Respondent understands this full well. Ironically, following the Government's statement (quoted at the outset, above), the remainder of the Government Opposition Brief is devoted to establishing the constitutionality under the facts of this case of this very clear, understandable and menacing remedy. 4B/

Furthermore, there is no mystery about the kind of injunction sought by the Securities & Exchange Commission ("SEC"), Respondent in this case. It is the same injunction against violation of Section 17(b) that the SEC secured from the District Court on July 12, 1984, which was then stayed pending appeal 5/ and then was denied on

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4B/ Res. Opp. 9-16;
5/ The Stay Order of the Court of Appeals as quoted in haec verba in the Petition herein at Petition ("Pet.") 17-18;

remand by the District Court when that Court dismissed the SEC complaint. That injunction is set forth in haec verba at page 17 of the Petition. It is what the SEC requested from the Court of Appeals in its briefs and it is what the Court of Appeals authorized. 6/

Accordingly, there is nothing speculative or hypothetical about the injunction whose constitutionality is at issue before this court, nor is there any doubt as to what that injunction would order, nor is there any doubt as to how this injunction would be enforced.

There is, however, one new and unique aspect to the issue before this Court. As noted above, this Court is being asked for

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6/ Whatever injunction the Court of Appeals authorized to be "fashioned" (Pet. App. 22a) would require disclosure; the SEC in its brief to the Court of Appeals sought the injunction quoted at Pet. 17 (See Pet. 42);

the first time to permit intervention by the federal courts in the publication of news articles in the financial press; it is being asked to enforce this intervention by injunctive relief, contempt procedures against offending publishers and suppression of offending publications.

This is not a disclosure case. It is an injunction case aimed at the publishers of the nation's financial press, ordering them to print court-dictated language in their articles under threat of contempt and suppression of their publication. Petitioner believes that, accordingly, this Court will recognize that it is being asked by the Respondent SEC to break new and treacherous ground.

II:

Respondent SEC next argues in its Opposition that the injunction authorized by the Court of Appeals is required to prevent deception of the public. 8/ Respondent

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8/ Res.Opp. 11-12;

admits that Petitioner does not oppose punishment of violations of Section 17 (b) after the fact. 9/ Respondent's preference for injunctive relief 10/ underscores the heightened threat faced by publishers of the financial press in this case. Respondent plainly prefers to threaten--before publication--the nation's financial publishers with contempt and their publications with suppression rather than prosecute them criminally after publication. This preference ignores two constitutional precepts long accepted by this Court.

First, this Court has long held that court-dictated disclosure in a newspaper or magazine article is no different a constitutional restraint than court-dictated suppression of content. Miami Herald v. Tornillo, 416 U.S. at 256. The Government seeks to distinguish Tornillo by citing Zauderer v. Office of Disciplinary Counsel, 471 U.S. at 650-651. 10A/ But Zauderer deals

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9/ Res. Opp. 9
10/ Res. Opp. 9, footnote 8;
10A/ Res. Opp. 14-15, footnote 13;

with a very different target, advertising. Zauderer holds:

> 471 U.S, at 651: "The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirment that appellant include in his advertisement purely factual and uncontroversial information about the terms under which his services will be available." (emphasis supplied)

In the case now before the Court, the Court of Appeals specifically rejected application of the "commercial speech" doctrine 10B/, as indeed it must because the targets of the injunction sought in WSPI are the substantive articles printed in Stock Market Magazine, the journalistic content of the Magazine, not its ads.

Second, this petitioner is in total accord with the policy of preventing de-

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10B/ Appendix to Petition ("Pet. App.") 14a-15a;

ception of the public. But if the petitioner is correct in equating the unconstitutionality of court-dictated disclosure within the content of articles in our press with court-dictated suppression of that content, then the basic prohibition against prior restraints is in full play in this case. The policy effectuated by such a restraint becomes subordinated to the constitutional impact of the restraint. The concurring opinion in New York Times v. U.S., 403 U.S. 713 at 726 would require the imperiling of a military transport at sea before:

> "even the issuance of an interim restraining order"

is justified, either suppressing protected language or dictating by Court order inclusion of Court-dictated language within protected content. As Chief Judge Robinson

stated in his August 1, 1986 opinion 11/, there is no such threat to the public safety involved in this case. That is the balancing of considerations in Respondent's attempt to subject the content of newspaper or magazine articles to Court injunction.

Against these two precepts of First Amendment law long accepted by this Court, the Government's Opposition relies heavily on Pittsburgh Press v. Pittsburgh Commission on Human Relations 431 U.S. 376. 12/. The Respondent argues that if an injunction in WSPI were:

> "carefully focused, address(ed) a continuing course of speech, and were imposed after an opportunity for full merits consideration" 13/

it would be constitutionally permissible, citing Pittsburgh Press. Careful probing of this position in this case reveals its constitutional flaws. Any injunction entered

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11/ Pet. App. 39a;
12/ Res. Opp. 10;
13/ Res. Opp. 10;

in this case would order the publisher of Stock Market Magazine to print within, or in juxtaposition to, an article in the Magazine that the article was published because the subject of the article bought ads or reprints. 13A/ The "full merits consideration" called for by Pittsburgh Press would be a District Court trial. The issue at trial would be the motive of the publisher of Stock Market Magazine when he published this or past articles about the same company, to wit, whether publication was a "tie-in" arrangement, or, by contrast, the result of the publisher's exercise of his professional judgment as a journalist. That trial would be a unique and unwelcome voyage by a Court into the ethics of journalism. In the entire history of our jurisprudence the

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13A/ Respondent distorts the revenues realized by the Magazine from ads and reprints (Res. Opp. 3); See Pet. 11 (ads) and the record before the Court of Appeals (C.A. 502) (reprints);

professional ethics of our publishers have never gone to trial under threat of injunction.

Assuming that the publisher lost that trial, he would then have two choices. He could either publish the court-dictated legend (which he had opposed at trial because of his belief that what he published is no business of the Court, or because be believed the Court to be wrong on the facts); or he could refuse for the same reasons. The publisher would then face contempt, jail and fines. Simultaneously, if the publisher followed this course, Stock Market Magazine--all of it and not just the offending article--would be barred from interstate commerce and the mails. If this Court has any doubt of this result, it need only examine the SEC's injunction entered under Section 17 (b) in this case on July 12, 1984 14/, in the District Court's first confrontation with the case, an injunction then stayed by the Court

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14/ Quoted in haec verba at Pet. 17;

of Appeals pending appeal.

Suppression of the 50.44% of column inches of Stock Market Magazine made up wholly of news and commentary (which never mentions an issuer or a security) and suppression of all the "company" articles in the Magazine that do not violate Section 17 (b) is hardly the "careful focus(ing)" of a remedy. It certainly is not "careful" focusing of the proposed injunctive relief on Section 17 (b) violations. 14A/

Moreover, Pittsburgh Press dealt with an advertisement, not with disclosure required by Court order within articles published in

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14A/ It is again ironic that the Government's Opposition cites Near v. Minnesota, 372 U.S. 58 in support of its argument that this Court's cases "foreclose" petitioner's argument. The Government states that in Near "there was a very real possibility that the injunction would suppress protected speech." (Res. Opp. at 11). In the case before the Court the injunction risks suppression of an entire Magazine containing protected speech because of a violation of Section 17(b) in one article.

that paper. Its holding excluded the very points at issue in WSPI:

> (at 413 U.S. 391): "Nor, a fortiori, does our decision authorize any restriction whatever, whether by content or layout, on stories or commentary originated by Pittsburgh Press. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however, controversial."

Petitioner submits that the injunction authorized by the Court of Appeals in WSPI restricts content originated by Stock Market Magazine in violation of that statement by this court in Pittsburgh Press; it does so by requiring a legend in published articles, a requirement enforced by contempt and suppression of Petitioner's Magazine. Petitioner submits that this same injunction restricts the protection afforded to editorial judgment in violation of the same statement by the Court in that case. It does so by ordering the publisher of Stock Market

Magazine what to print. These restrictions may arise from the best of policy considerations. But constitutionally prohibited restrictions they remain.

None of the cases cited by Respondent in supplement to Pittsburgh Press (U.S. v. Amick, 439 F.2d 351 cert. denied 403 U.S. 918, Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, Curtis Publishing Co. v. Butts, 388 U.S. 130, Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, SEC v. Blavin, 577 F. Supp. 1304, Giboney v. Empire Storage, 336 U.S. 490 and Meese v. Keene, 481 U.S. 465) 15/ 15A/ have anything to do with an injunction issued against a newspaper or magazine ordering it to print content in its articles (or in juxtaposition to them) under threat of contempt and suppression. There is

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15/ Cited at Res. Opp. 11-14;
15A/ the quote from House Report No. 85, 73rd Congress (Res. Opp. 11) in no way justifies an injunction against an offending periodical; if it had (rather than penalties imposed after the fact) serious constitutional objections would have certainly surfaced in 1933;

no precedent for what the Respondent SEC seeks in this case.

III:

Respondent's Opposition does more than ask this Court to break new ground along the sensitive border that heretofore constitutionally protected the press. Its rationale for so doing is as insidious as the result it seeks. That rationale is nothing less than a wholly new theory of government regulation of the press. Eschewing, as did the Court of Appeals, the notion that "commercial speech" was involved in this case, 15B/ the Government in its Opposition seeks this Court to approve an injunction against Stock Market Magazine:

> "imposed as a remedy for violations of that provision" (Section 17 (b) of the Securities Act of 1933)" as aspect(s) of a regulatory scheme designed to eliminate deception in the securities markets." 16/

15B/ Pet. App. 15a-17a;
16/ Res. Opp. 11;

The full scope of this sought-for expansion of intervention of the federal government into heretofore constitutionally-protected speech (reaching beyond any prior governmental regulation of "commercial speech") is graphically described in the full quotation from the Court of Appeals opinion of which the foregoing quote is but a part:

> "We believe...that the government may have the power to regulate Stock Market Magazine, not because the articles are "commercial speech," but rather because of the federal government's broad powers to regulate the securities industry. Where the federal government extensively regulates a field of economic activity, communication of the regulated parties often bears directly on the particular economic objectives sought by the government." 18/

The justification for the injunction in this case before this Court thus turns on the fact that the Respondent (in its Opposition) and the Court of Appeals (in its June 21, 1988 opinion) contend that subjects of governmental economic regulation are also subject

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18/ Pet. App. 15a;

to regulation of their communications regardless of whether those communications are otherwise constitutionally protected. No case in the history of First Amendment law has ever gone that far. The Government's Opposition plainly seeks this Court to break new ground in the highly sensitive area of first amendment protection of the nation's business press.

Throughout its Opposition the Government urges this new intervention in order to prevent deception of the public. It is essential to note that Stock Market Magazine is not a "regulated party" whose

> "communication...often bears directly on the particular economic objectives sought by the government" 19/

Lowe v. SEC, 472 U.S. 181 (1985) made that underlying fact clear. The Chief Judge of the U.S. District Court noted that every case cited by the SEC before him (when they sought

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19/ Pet. App. 15a, quoting from the Court of Appeals opinion;

unsuccessfully to reinstate their injunction in the proceeding that resulted in dismissal of this lawsuit by the Chief Judge) involved: "parties to securities transactions." and that:

> "None of these cases apply to the obligation of a bona fide publication such as Stock Market Magazine." 20/ (emphasis in the original)

Therein lies the undercutting flaw of the Respondent's position. Petitioner need not inform this Court that the nation's financial press is not a "regulated party" within any conceivable definition of that phrase. 20A/

More significantly, however, is the proposition that "communication" to and

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20/ Pet. App. 36a-37a; the Chief Judge was speaking of the violations alleged in this case of Section 10(b) of the Securities Exchange Act of 1934; everything said therein applies with equal force to Section 17(b);

20A/ If articles in the content of the financial press are "being paid for by the company featured" (Resp. Opp. 12) the result is a breach of journalistic ethics. Any such article in the press--anywhere--is also such a breach. The Courts, however, have never been in the business of policing the ethics of our free press and should not start now, with an injunction as the enforcer;

through the financial press--or to and through news articles anywhere--of a legitimate subject of governmental economic regulation becomes regulated because it:

> "bears directly on the particular economic objectives of the Government"

, as the Court of Appeals and Respondent contend. 21/ Where does that regulation of communication begin and where does it end? At page 59 of the Petition herein there are listed a number of industries subject to legitimate economic regulation by the Government. Are all of their "communications" to the press which "bear directly on the particular economic objectives of the Government" now subject to SEC, or FTC, or IRS, regulation and supervision and, through Court injunction, restriction?

This modest proposal (in Swiftian terms) is not a figment of Petitioner's imagination or conjuring. It is in the language of the

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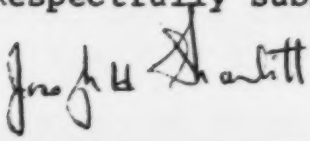
21/ Pet. App. 15a; Res. Opp. 11;

Court of Appeals opinion and in the language of Respondent's Opposition. 22/ It reflects the frightening new world of the First Amendment that will emerge from this case if this Court does not accept this case and reverse it on review.

Wherefore, Petitioner prays the Court to issue a writ of certiorari to the U.S. Court of Appeals for the District of Columbia Circuit ordering review by this Court of its opinion of June 21, 1988 on the grounds set forth in Petitioner's Petition.

Respectfully submitted,



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22/ Pet. App. 15a; Res. Opp. 11.